No. 83-284
IN THE

Supreme Court of the United States

October Term, 1983

JOHN C. MOON and ZION INDUSTRIAL CORPORATION,
Petitioners,

vs.

HYOSUNG AMERICA, INC.,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT BEFORE JUDGMENT.

RESPONDENT'S BRIEF IN OPPOSITION.

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Questions Presented for Review.

1. Whether certiorari before judgment should issue to review a routine prehearing order by the Court of Appeals, limiting petitioners' appeal to matters for which a timely notice of appeal was filed?

2. Whether certiorari before judgment should issue to review the Court of Appeals' interpretation of a District Court procedural order, where the Court of Appeals invited petitioners to seek clarification in the District Court before proceeding further in the Court of Appeals, and petitioners declined to exercise such opportunity?

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RESPONDENT'S BRIEF IN OPPOSITION.

The respondent Hyosung America, Inc. respectfully requests that this Court deny the petition for writ of certiorari before judgment, and award damages to respondent pursuant to Supreme Court Rule 49.2 in accordance with the motion filed concurrently herewith.

Opinion Below.

The Ninth Circuit's order is set forth as Appendix L to the petition for writ of certiorari and is not reported.

Jurisdiction.

Petitioners seek review of a prehearing order (hereinafter "the Order") entered by the Ninth Circuit on May 24, 1983. Contrary to the suggestion in the petition for writ of certiorari (hereinafter "the Petition") (Petition, at 2), the Order did not dismiss petitioners' entire appeal. Rather, the Order simply limited the appeal to those issues for which a timely notice of appeal had been filed by petitioners.

The appeal is still in its preliminary stages in the Ninth Circuit. Briefs on the merits have not yet been filed; oral argument before the Court has not yet been had; and the Ninth Circuit has not rendered its judgment. Indeed, the certified record from the District Court was only recently requested and has not yet been filed in the Court of Appeals. Thus, it is not clear whether this case is yet "in" the Court of Appeals for purposes of jurisdiction under 28 U.S.C. § 1254(1). *See, e.g., United States v. Nixon*, 418 U.S. 683, 689-90 (1974); R. Stern & E. Gressman, *Supreme Court Practice*, § 2.3, at 54 (5th ed. 1978). In any event, as set forth below, this case obviously does not meet the standards set forth in Supreme Court Rule 18 for granting certiorari to a federal court of appeals before judgment.

Statutory Provisions.

Rule 18, Rules of the Supreme Court of the United States:

CERTIORARI TO A FEDERAL COURT OF APPEALS BEFORE JUDGMENT

A petition for writ of certiorari to review a case pending in a federal court of appeals, before judgment is given in such court, will be granted only upon a showing that the case is of such imperative public importance as to justify the deviation from normal appellate practice and to require immediate settlement in this court. See 28 U.S.C. § 2101(e); see also, *United States v. Bankers Trust Co.*, 294 U.S. 240 (1935); *Railroad Retirement Board v. Alton R. Co.*, 295 U.S. 330 (1935); *Rickert Rice Mills v. Fontenot*, 297 U.S. 110 (1936); *Carter v. Carter Coal Company*, 298 U.S. 238 (1936); *Ex parte Quirin*, 317 U.S. 1 (1942); *United States v. Mine Workers*, 330 U.S. 258 (1947); *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952); *Wilson v. Girard*, 354 U.S. 524 (1957); *United States v. Nixon*, 418 U.S. 683 (1974).

Statement of the Case.

This is a diversity action for breach of a contract to transfer stock and real property. The action was brought in the United States District Court for the Central District of California, by respondent Hyosung America, Inc. against petitioners John C. Moon and Zion Industrial Corporation. After a full trial on the merits the District Court entered judgment in favor of respondent on October 29, 1982 (''the October 29 Judgment'').

Petitioners did not file an appeal from the October 29 Judgment within the 30-day period provided by Rule 4(a)(1), Federal Rules of Appellate Procedure (''FRAP''). Nor did they file any timely post-trial motion under Rules 50(b), 52(b), or 59 of the Federal Rules of Civil Procedure (''FRCP''), any of which would have extended the appeal time pursuant to Rule 4(a)(4), FRAP. Nor did petitioners seek any extension of the appeal time from the District Court pursuant to Rule 4(a)(5), FRAP.

What petitioners did do, on November 24, 1982, was to file a motion to vacate the October 29 Judgment pursuant to Rule 60(b), FRCP. (Petition, App. D.) Concurrently, petitioners filed an ex parte application for an order to (1) shorten the time for the hearing on the Rule 60(b) motion and (2) stay execution of the judgment, pursuant to Rule 62(b), FRCP, pending the hearing on the Rule 60(b) motion. (Petition, App. E.)

On November 24, 1982, the District Court entered an order staying execution of the October 29 Judgment until December 13, 1982, and the latter date was set for the hearing on the Rule 60(b) motion. (Petition, App. G.) At no time did petitioners seek, nor did the November 24 order (''the temporary Stay Order'') in any way grant, petitioners an extension of time in which to file their appeal from the

October 29 Judgment.

On November 29, 1982, the 30-day time period expired for filing a notice of appeal from the October 29 Judgment.

On December 13, 1982, the District Court denied petitioners' Rule 60(b) motion to vacate the judgment. (Petition, App. H.) On that same date—45 days after the entry of the October 29 Judgment—petitioners filed their notice of appeal ("the Notice of Appeal"). (Petition, App. I.)

On February 25, 1983, at a prebriefing conference in the Ninth Circuit, the question of the timeliness of the Notice of Appeal was raised and discussed at length. Petitioners took the position that the District Court's temporary Stay Order, staying *execution* on the October 29 Judgment until December 13, 1982, also stayed the *entry* of that judgment (and the beginning of the time for filing a notice of appeal) until December 13, 1982. Petitioners could not explain how the District Court could have stayed entry of a judgment that had already been entered; nor could they explain why, if entry of the judgment was in fact stayed, the District Court's order did not so state.

Nonetheless, petitioners asked that they be given time in which to bring a motion in the District Court for clarification of the temporary Stay Order. Accordingly, the Conference Attorney informed the parties that an order would be entered giving petitioners until April 1, 1983 to obtain clarification of the Stay Order or withdraw the appeal, respondent agreed that if, by April 1, petitioners had not withdrawn their appeal, respondent would file a motion to dismiss or to limit appellate jurisdiction. An order to that effect was entered by the Ninth Circuit on March 7, 1983 (a copy of which is set forth as Appendix A hereto).

Appellants never sought clarification of the temporary Stay Order, as they had been invited to do. Accordingly,

respondent filed its motion to dismiss or to limit appellate jurisdiction. On May 24, 1983, the Ninth Circuit entered its order concluding that the Notice of Appeal was untimely as to the October 29 Judgment, but timely as to the District Court's December 13 order denying petitioners' Rule 60(b) motion. In accordance with *Browder v. Director, Illinois Department of Corrections*, 434 U.S. 257, 263 n.7 (1978), the Ninth Circuit limited appellate jurisdiction to the issue of whether the District Court abused its discretion in denying the Rule 60(b) motion.

Petitioners did not request the court reporter or the clerk in the District Court to prepare the record on appeal until earlier this month, and the certified record has not yet been filed with the Ninth Circuit. Pursuant to the briefing schedule ordered by the Ninth Circuit, petitioners' opening brief in the Ninth Circuit is now due October 7, 1983, and respondent's brief in opposition is due November 9, 1983. (A copy of the Ninth Circuit's order establishing the briefing schedule is set forth as Appendix B hereto.)

REASONS FOR DENYING THE WRIT.

A. This Case Obviously Is Not of Such Imperative Public Importance as to Justify Certiorari Before Judgment in the Ninth Circuit.

This is a diversity case involving a wholly private dispute based on ordinary principles of state substantive law and federal practice and procedure. It is frivolous to seek certiorari before judgment in the Court of Appeals in this case. Obviously, and in contrast to such cases as *United States v. Nixon*, 418 U.S. 683 (1974), nothing about this case is "of such imperative public importance as to justify the deviation from normal appellate practice and to require immediate settlement in this Court." Rule 18, Supreme Court Rules.

B. The Questions on Which Petitioners Seek Review Are Not Properly Presented.

The questions presented in the Petition are all premised on petitioners' assertions as to their intent in seeking the temporary Stay Order in the District Court; the District Court's intent in granting such order; and petitioners' understanding of the effect of such order.

These same assertions were all made by petitioners in the Ninth Circuit. At petitioners' specific request, and out of an abundance of fairness, the Ninth Circuit suspended the progress of the appeal to allow petitioners to seek clarification from the District Court regarding its and the parties' understanding of the temporary Stay Order. Petitioners declined to exercise this opportunity, and it is remarkable to say the least that they now seek relief from the United States Supreme Court.

C. In Any Event the Ninth Circuit's Decision Was Clearly Correct and Does Not Conflict With the Decisions of Any Other Court of Appeals.

Petitioners have not, and cannot, assert any plausible basis for seeking certiorari before judgment; nor, as set forth above, are the questions raised by petitioners even properly presented in this case. The Petition is made even more frivolous by the fact that the Ninth Circuit's order in this case simply applies well-established rules of federal practice and procedure and, contrary to petitioners' assertions, does not conflict with the decisions of any other Court of Appeals.

It is black-letter law that (1) the 30-day appeal period set forth in Rule 4(a)(1), FRAP, is mandatory and jurisdictional; (2) pursuant to Rule 4(a)(4), FRAP, the only post-trial motions that toll the running of the 30-day period until disposition by the District Court are motions under Rules 50(b) (judgment notwithstanding the verdict), 52(b) (motion to amend or make additional findings of fact), or 59 (motion to alter or amend the judgment or motion for new trial), FRCP; and (3) the only other means for avoiding the 30-day time bar is to obtain a timely extension from the District Court pursuant to Rule 4(a)(5), FRAP, based "upon a showing of excusable neglect or good cause." *See, e.g., Browder v. Director, Illinois Department of Corrections*, 434 U.S. 257, 263-65 & n.7 (1978); *Needham v. White Laboratories, Inc.*, 454 U.S. 927, 929-30 (1981) (Rehnquist, J., dissenting from denial of certiorari); 9 J. Moore, B. Ward & J. Lucas, *Moore's Federal Practice* ¶ 204.12[1] (2d ed. 1983).

By its very terms, Rule 60(b) provides that a motion under its provisions "does not affect the finality of a judgment or suspend its operation." Rule 62(b) does give the District Court discretion to grant a stay of *execution* on a judgment

pending decision on a Rule 60(b) motion; but nothing in its terms overrides the express terms of Rule 4(a), FRAP, and Rule 60(b), FRCP, providing that the 30-day period for appeal is not tolled pending decision on the Rule 60(b) motion.

Petitioners attempt to manufacture an artificial "dilemma" (Petition, at 20), supposedly arising out of the fact that a Rule 60(b) motion does not toll the running of the 30-day period. Petitioners contend that (1) if a timely notice of appeal is filed from the underlying judgment the District Court is divested of jurisdiction to consider any Rule 60(b) motion; or (2) if a party refrains from filing a notice of appeal in order to preserve the District Court's jurisdiction to consider the Rule 60(b) motion, then that party loses the right to appeal the original judgment.

Under well-settled law, however, including the law of the Ninth Circuit, this "dilemma" simply does not exist. Different Circuits have worked out different mechanics for dealing with the problem, but in every Circuit there is a means readily available for pursuing both an appeal of the original judgment and a Rule 60(b) motion. For example, in the Ninth Circuit, the well-established procedure is to (1) file a notice of appeal from the original judgment, thus preserving such appeal; (2) then ask the District Court if it wishes to entertain the Rule 60(b) motion; and (3) if so, seek a remand from the Court of Appeals. *See, e.g., Long v. Bureau of Economic Analysis*, 646 F.2d 1310, 1318 (9th Cir. 1981). *See generally* 7 J. Moore & J. Lucas, *Moore's Federal Practice* ¶ 60.30[2] (2d ed. 1982); 11 C. Wright & A. Miller, *Federal Practice and Procedure: Civil* § 2873 (1973).

Petitioner also attempts to manufacture a conflict in the Circuits by citing to an unpublished Fourth Circuit opinion. *Paxman v. Wilkerson*, 502 F.2d 1163 (table), 18 Fed. R. Serv. 2d 1554 (4th Cir. 1974) (per curiam). That case does

not even address the question, however, of whether granting a Rule 62(b) stay pending disposition of a Rule 60(b) motion tolls the running of the 30-day period for appealing the original judgment. Rather, the opinion simply holds that, where a Rule 62(b) stay has been granted pending disposition of a Rule 60(b) motion, the proceedings in the District Court must go forward before the case is considered by the Court of Appeals. Although the reasoning in the opinion is obscure at best, and it obviously was not intended to be used as precedent, the opinion says nothing about the ultimate appealability of the underlying judgment.

Conclusion.

For the reasons set forth above, the petition for a writ of certiorari before judgment is frivolous and should be denied and, as set forth in the motion filed concurrently herewith, damages should be awarded to respondent pursuant to Supreme Court Rule 49.2.

Dated: September 22, 1983.

Respectfully submitted,

RAYMOND C. FISHER,
Counsel of Record,
MILES N. RUTHBERG,
TUTTLE & TAYLOR INCORPORATED,
Y. PETER KIM,
Attorneys for Respondent,
Hyosung America, Inc.

APPENDIX A.

Order.

United States Court of Appeals for the Ninth Circuit.

Hyosung America, Incorporated, Plaintiff-Appellee, vs. John C. Moon and Zion Industrial Corporation, Defendants-Appellants. No. 82-6099. D.C. # CV-81-4784-MLR Central California.

Filed: March 7, 1983.

On February 25, 1983, a Prebriefing Conference was held by Conference Attorney Richard G. R. Schickele. Appellants were represented by Robert J. Davis and Alfred R. Calabro. Appellee was represented by Miles N. Ruthberg.

If appellant does not withdraw this appeal by April 1, 1983, appellee will file a motion to dismiss or to limit appellate jurisdiction on or before April 15, 1983. If the appeal is not dismissed, appellants, on or before May 31, 1983 will contact the Conference Attorney to arrange a second conference.

This order is subject to reconsideration by a judge if any objection is filed within 10 days of the entry of the order.

FOR THE COURT:
/s/ RICHARD G. R. SCHICKELE
Richard G. R. Schickele
Conference Attorney

APPENDIX B.

Order.

United States Court of Appeals for the Ninth Circuit.

Hyosung America, Incorporated, Plaintiff-Appellee, vs. John C. Moon and Zion Industrial Corporation, Defendants-Appellants. No. 82-6099. D.C. # C-81-4784 R Central California.

Filed: August 26, 1983.

On August 7, 1983, a Prebriefing Conference was held by telephone before Conference Attorney Norman P. Vance. Appellants were represented by Robert J. Davis and Alfred A. Calabro and appellee was represented by Miles N. Ruthberg.

(1) Appellants shall order and designate the reporter's transcript on or before August 26, 1983.

(2) Appellants shall file a brief of not more than 20 pages on or before October 7, 1983.

(3) Appellee shall file a brief of not more than 20 pages on or before November 9, 1983.

(4) Appellants may file a reply brief of not more than 5 pages within 14 days of the service date of appellee's brief.

(5) This order is subject to reconsideration by a judge if any objection is filed within 10 days of the entry of the order.

FOR THE COURT:
/s/ NORMAN P. VANCE
Norman P. Vance
Conference Attorney